Appendix A

In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-2678

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICARDO VILLEGAS,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 04 CR 272 – J.P. Stadtmueller, *Judge*

Argued April 2, 2007 – Decided July 27, 2007

Before RIPPLE, ROVNER and WOOD, *Circuit Judges*

RIPPLE, *Circuit Judge.* Ricardo Villegas was indicted on one count of illegal re-entry into the United States after having been deported previously on account of two aggravated felony convictions, *see* 8 U.S.C. § 1326(b)(2), and one count of intentional possession of marijuana, *see* 21 U.S.C. § 844. Mr. Villegas moved to suppress evidence of his identity

as the product of an unlawful arrest and detention. A hearing was held before a magistrate judge who recommended denial of Mr. Villegas' motion. When Mr. Villegas objected to the magistrate judge's recommendation, the district court reviewed Mr. Villegas' motion de novo at a combined hearing on that motion and bench trial. The district court denied the motion and found Mr. Villegas guilty on both counts. Mr. Villegas now appeals the district court's denial of his motion to suppress. For the reasons set forth in this opinion, we believe that the district court correctly determined that Mr. Villegas' arrest did not violate the Fourth Amendment and therefore committed no error in admitting the evidence. Accordingly, we affirm the judgment of the district court.

I

BACKGROUND

A.

Officers Thomas Obergon and Michael Lutz were both assigned to the Milwaukee Police Department's ("MPD") Gang Squad and knew Mr. Villegas and Ephraim Munoz to be members of the Mexican Posse. They also knew that Munoz was wanted in connection with a homicide. In addition, as part of his regular investigation of gang members, Officer Obergon had learned from the United States Department of Homeland Security ("DHS") that Mr. Villegas had been deported previously on account of his status as an aggravated felon. Officer Obergon

also had run Mr. Villegas' name through the National Crime Information Center ("NCIC"), and had received confirmation of Officer Obergon's information. The NCIC report also noted that Mr. Villegas was wanted by the Bureau of Immigration and Customs Enforcement ("ICE") through an apprehension request to local law enforcement.

On August 20, 2004, Officers Obergon and Lutz received a call from an off-duty MPD officer, informing them that Munoz and Mr. Villegas had been seen drinking beer outside of a building at 4955/4957 South 14th Street. That building was a two-story duplex owned by Mr. Villegas' sister, Maria Ventura. One unit of the duplex was situated on the first floor; another unit occupied the second floor. Mr. Villegas and his sister lived in the first floor unit.

The second floor unit was occupied by May and John Franklin. The Franklins had lived in that unit for twenty-three years and were unrelated to Ventura and Mr. Villegas. May Franklin ran a small business from her home, selling dolls, crafts, men's clothing and other assorted items. She advertised the business by a sign in front of the duplex, which listed a phone number and invited prospective customers to call for an appointment.

The duplex had two entrances. These entrances were adjacent to one another on the southeast corner of the building: one on the eastern corner of the building's southern exposure and one on the southern corner of the building's eastern exposure. Each entrance had a solid wood inner door and an outer screen door. The entrances led into a small

common hallway that provided access to the first floor unit where Mr. Villegas and his sister lived, a staircase leading to the Franklins' second floor unit and a staircase leading down to a basement. Each unit was closed to the common hallway.

When Officers Obergon and Lutz learned that Munoz and Mr. Villegas had been seen outside the duplex, they, along with other MPD officers, proceeded to the area and assembled at a location near the duplex. At some point, Officer Obergon told Officer Lutz that Mr. Villegas was a previously deported aggravated felon and that ICE had issued an apprehension request. Officer Obergon then left the assembly point in an unmarked police car to confirm that Munoz and Mr. Villegas were indeed outside 4955/4957 South 14th Street. When Officer Obergon passed the address, he saw Munoz and Mr. Villegas outside the home drinking beer. He recognized both men on sight from his prior investigations. Officer Obergon notified the other MPD officers that Munoz and Mr. Villegas were outside the duplex and, in order to avoid detection, proceeded down the street to park his vehicle.

When Officer Lutz and the other MPD officers reached the duplex, neither Munoz nor Mr. Villegas was outside. The officers surrounded the building, and Officer Lutz took up a position near one of the entrances. When Officer Lutz arrived at the entrance, the inner doors of both entrances were open and the screen doors, while closed, were unlocked. Officer Lutz heard another officer shout that somebody had tried to exit the building through

a window, but had reentered the building. Officer Lutz then entered the common hallway.

As Officer Lutz entered the common hallway, Mr. Villegas exited the first floor unit into the common hallway. Officer Lutz recognized Mr. Villegas on sight based on a picture the officer had seen of Mr. Villegas earlier that day. Officer Lutz identified himself as a police officer, addressed Mr. Villegas by name and told Mr. Villegas that he was under arrest. While outside the first floor unit and upon hearing Officer Lutz, Mr. Villegas dropped a small clear bag whose contents, upon visual inspection, Officer Lutz suspected to be marijuana. Officer Lutz again told Mr. Villegas that he was under arrest and reached for the defendant's arm. Mr. Villegas resisted, shoving Officer Lutz into a wall or the doorway to the unit, and attempted to reenter the first floor unit. Officer Lutz called for assistance and was joined by a second MPD officer. Mr. Villegas continued to resist arrest and the three men, Mr. Villegas, Officer Lutz and the second MPD officer, fell into the first floor unit. At some point in the struggle, Mr. Villegas wrestled free of Officer Lutz and kicked him in his midsection. When the officers finally were able to place Mr. Villegas in handcuffs, he continued to resist the officers, spitting blood and mucus at them, some of which landed on Officer Lutz's arm.

After the arrest, Mr. Villegas was taken to the Milwaukee County jail. His booking in the Milwaukee County jail caused a notice to be sent to ICE Special Agent Ronald Rickey. About a month earlier, Agent Rickey had received information that Mr. Villegas had reentered the United States and

might be in the Wisconsin area. Upon receiving this information, Agent Rickey had ordered Mr. Villegas' alien registration file, or "A file," which included a fingerprint card and a picture of Mr. Villegas. Agent Rickey then matched the fingerprints in the A file to fingerprints taken by the MPD after a prior arrest of Mr. Villegas.

As a result of the notice received following Mr. Villegas' August 20, 2004 arrest, Agent Rickey went to the Milwaukee County jail on August 23, 2004 to interview Mr. Villegas. Upon his arrival, Agent Rickey recognized Mr. Villegas from the photograph in his A file. Although Mr. Villegas had been booked under the name Douglas Enrique Villegas, one of Mr. Villegas' known aliases, he responded to Agent Rickey when the agent addressed him as Ricardo. Agent Rickey then read Mr. Villegas his *Miranda* rights, which Mr. Villegas acknowledged. Mr. Villegas declined the presence of counsel. Agent Rickey then proceeded to interview Mr. Villegas about his background. The answers that he provided were consistent with the information in his A file. The interview lasted about fifteen minutes and ended when Mr. Villegas stated that he did not wish to answer any further questions.

B.

Mr. Villegas was charged in a two-count indictment. The first count charged him with illegal reentry into the United States in violation of 8 U.S.C. § 1326(b)(2);[3] the second count charged him

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[3] 8 U.S.C. § 1326 provides, in pertinent part:

(a) In general

Subject to subsection (b) of this section, any alien who--

> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection--

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with the knowing and intentional possession of marijuana in violation of 21 U.S.C. § 844. The latter charge was based on the marijuana found in the bag dropped by Mr. Villegas at the time of his arrest.

Mr. Villegas moved to suppress, as the fruits of an unlawful seizure, both the statements about his identity that he had made to Agent Rickey after his arrest and the marijuana that had been found at the time of his arrest. He contended that his Fourth Amendment right, made applicable to the states by the Fourteenth Amendment, to be free from unreasonable searches and seizures had been violated when Officer Lutz entered the common hallway of the duplex without a search warrant. The district court referred the motion to a magistrate judge who recommended that the motion be denied because Officer Lutz's entry into the duplex fell within the exigent circumstances exception to the Fourth Amendment's warrant requirement.

Mr. Villegas filed an objection to the magistrate judge's recommendation. The district court then held a joint hearing at which it conducted both a de novo hearing on Mr. Villegas' suppression motion and a bench trial. At the conclusion of this proceeding, the district court denied Mr. Villegas' motion to suppress. The court concluded that, because Mr. Villegas had no legitimate expectation of privacy in the common hallway, Officer Lutz's entrance into the common hallway without a warrant had not violated

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(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both[.]

Mr. Villegas' Fourth Amendment rights. The district court further noted that it did not believe that, under *INS v. Lopez-Mendoza,* 468 U.S. 1032 (1984), the Fourth Amendment's exclusionary rule would require release of Mr. Villegas after his identity had been established by fingerprints or other records. The district court then found Mr. Villegas guilty on both counts of the indictment.[4]

Mr. Villegas now appeals the decision of the district court denying his motion to suppress his statements to Agent Rickey as the fruit of an unlawful seizure.

II

DISCUSSION

In reviewing the district court's decision with respect to a motion to suppress, we review the district court's findings of fact for clear error and its legal determinations de novo. *United States v. Yang,* 478 F.3d 832, 835 (7th Cir. 2007).

Mr. Villegas contends that Officer Lutz's entry into the common area of the duplex without a warrant violated the Fourth Amendment's prohibition against warrantless searches and seizures. He submits that, but for the unlawful entry and subsequent arrest, the Government would have had no evidence of his identity and that, without that

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[4] The Government subsequently moved to set aside Mr. Villegas' conviction on Count II of the indictment. The district court granted the motion.

evidence, it would not have been possible to convict him for unlawful reentry into the United States. The Government offers in reply three separate grounds that, in its view, support the decision of the district court. First, the Government contends that Mr. Villegas had no legitimate expectation of privacy in the common area of the duplex; therefore, Officer Lutz's warrantless entry into that area did not violate the Fourth Amendment. Next, the Government submits that, even if Officer Lutz's entry into the common area of the duplex violated Mr. Villegas' Fourth Amendment rights, the arrest and subsequent detention of Mr. Villegas were not unlawful because the arrest was supported by probable cause. Because there was probable cause for the arrest, the Government continues, any statements made by Mr. Villegas outside of the duplex in the course of his detention do not fall within the Fourth Amendment's exclusionary rule. Lastly, the Government submits that, even if Officer Lutz violated Mr. Villegas' Fourth Amendment rights and there was no probable cause to support his arrest and continued detention, evidence pertaining to Mr. Villegas' identity does not fall within the Fourth Amendment's exclusionary rule.

We shall address the first two of the Government's contentions. However, because we conclude that, under the circumstances, Officer Lutz's warrantless entry into the duplex's common areas did not violate Mr. Villegas' Fourth Amendment rights, and that, in any event, Mr. Villegas' continued detention was lawful because it was supported by probable cause, we need not

address the Government's contention that identity evidence does not fall within the strictures of the Fourth Amendment's exclusionary rule.

A. Officer Lutz's Warrantless Entry into the Duplex

The Fourth Amendment protects against warrantless intrusions by the government into areas in which that individual holds a reasonable expectation of privacy. *Yang,* 478 F.3d at 835. The district court determined that, because Mr. Villegas had no legitimate expectation of privacy in the duplex's common hallway, Officer Lutz's warrantless entry into that area did not violate the Fourth Amendment.

A defendant seeking to suppress the fruits of a search bears the burden of demonstrating both that he held an actual subjective expectation of privacy and that the expectation "is one that society is prepared to recognize as reasonable." *Id.* In determining whether a defendant held a subjective expectation of privacy, we look at the defendant's efforts to conceal and keep private that which was the subject of the search. *Id.* To say that society is prepared to recognize an expectation of privacy as reasonable "recognizes the everyday expectations of privacy that we all share." *Minnesota v. Olson,* 495 U.S. 91, 98 (1990). Thus, our inquiry into whether a defendant's expectation of privacy was reasonable is necessarily fact dependent, *see United States v. Smith,* 978 F.2d 171, 180 (5th Cir. 1992), and "whether a legitimate expectation of privacy exists in a particular place or thing" must be determined on a

case-by-case basis, *United States v. Waller,* 426 F.3d 838, 844 (6th Cir. 2005).

Mr. Villegas has not demonstrated a subjective expectation of privacy with respect to the common hallway. Nor has he shown that any subjectively held expectation of privacy that he might hold with respect to that hallway is one that society is prepared to recognize as reasonable. Although Ventura testified that the solid outer doors leading to the common hallway normally were kept closed and locked, on the day in question, those doors were open. Indeed, Officer Lutz testified that he could see into the common hallway through a screen door, which itself was unlocked. Exposing the activities within the common hallway to the world is inconsistent with a subjective expectation of privacy, particularly when the other occupants of the duplex, the Franklins, ran a business from the property that was advertised by a sign in front of the building.

Even if Mr. Villegas held a subjective expectation of privacy with respect to the common hallway, the facts of this case and our precedents reveal that such an expectation would not be "one that society is prepared to recognize as reasonable." *Yang,* 478 F.3d at 835. First, the common hallway was the sole regular access to both units in the duplex. Anyone desiring access to the Franklins' home, including the Franklins' customers and, indeed, the Franklins themselves, had to pass through that hallway to reach the Franklins' unit. *See United States v. Espinoza,* 256 F.3d 718, 723 (7th Cir. 2001) (noting that tenants in multi-family housing buildings lack a reasonable expectation of privacy in common areas of

the buildings); *United States v. Concepcion,* 942 F.2d 1170, 1172 (7th Cir. 1991) (holding that the defendant had no reasonable expectation that his activities in an apartment building's common entrance would remain his secret). Nor did Mr. Villegas present any evidence that suggests that he and his sister were related to the Franklins, such that the duplex in its entirety should be considered a single dwelling; indeed, the evidence of record supports the opposite conclusion. *But cf. United States v. King,* 227 F.3d 732, 749-50 (6th Cir. 2000) (finding a reasonable expectation of privacy in a common basement accessible only by invitees of a duplex's tenants and where all of the tenants were family members). We have held previously that circumstances such as the one detailed in this record are inconsistent with a legitimate expectation of privacy. *See Concepcion,* 942 F.2d at 1172 (holding that tenants have no reasonable expectation of privacy in the common areas of an apartment building); *see also Espinoza,* 256 F.3d at 723 (noting "considerable tension" between a district court's ruling applying the knock and announce rule of *Wilson v. Arkansas,* 514 U.S. 927 1995), to the common area of a duplex and our prior holdings that tenants in multi-family housing units lack a legitimate expectation of privacy in common areas in which landlords and co-tenants may admit freely outsiders).

Mr. Villegas points to a number of cases from other courts of appeals holding that the defendant had a legitimate expectation of privacy in a common area of a duplex or other small multi-family

dwelling.[5] We believe that these cases simply

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[5] The primary cases to which Mr. Villegas points are *United States v. King*, 227 F.3d 732 (6th Cir. 2000), *United States v. Fluker*, 543 F.2d 709 (9th Cir. 1976), and *Fixel v. Wainwright*, 492 F.2d 480 (5th Cir. 1974).

In *King*, the Sixth Circuit concluded that the defendant had a legitimate expectation of privacy in the shared basement of a duplex. 227 F.3d at 749-50. Although the court in *King* relied on Sixth Circuit precedent holding that tenants in an apartment building had a legitimate expectation of privacy in common areas not open to the public, *id.*, the court first noted that the ultimate determination of whether a defendant has a legitimate expectation of privacy in a particular place must be determined on a case-by-case basis, *id.* at 744. The court then looked to the facts in that particular case in addition to circuit precedent to determine whether the defendant there had a reasonable expectation of privacy. *Id.* at 749-50.

The facts of *King* highlight the fact-specific inquiry into a reasonable expectation of privacy. Both units of the duplex involved in *King* were occupied by members of a single family: The defendants, who were brothers, lived in one unit while their mother and siblings lived in another. *Id.* at 750. Thus, the housing unit in *King* more closely resembled a single family house than a duplex. Further, the area in question in *King* was the basement of the building accessible only to the tenants, not a common hallway through which any visitor would pass to reach either of the dwelling units.

In *Fluker*, the Ninth Circuit determined that the defendant held a legitimate expectation of privacy in a common hallway of a duplex that normally was locked to outsiders. 543 F.2d at 712. The court emphasized that its inquiry into the defendant's legitimate expectation of privacy focused on "the particular circumstances of th[e] case." *Id.* at 716. After concluding that, under those circumstances, the defendant held a legitimate expectation of privacy in the common hallway, the court added that its holding was confined to the facts of that case. *Id.* at 717. Unlike the present case, the facts of *Fluker* reveal that the residents of both units in the duplex were co-conspirators in a

emphasize the fact-dependent nature of the inquiry into the reasonableness of an individual's expectation of privacy in a particular place. Under the facts of this case, Mr. Villegas clearly had no

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heroin distribution operation. *Id.* at 712. In that sense, the occupants had a common interest in maintaining the privacy of the common hallway. Therefore, it would not be unreasonable for each occupant to conclude that the others would maintain the privacy of all occupants of the duplex to advance their common purpose.

In *Fixel*, the Fifth Circuit concluded that the defendant had a legitimate expectation of privacy in a fenced, common backyard shared by the units of a four-unit, multi-family dwelling. 492 F.2d at 484. The yard was accessible only by passing through a dwelling unit. *Id.* In reaching this conclusion, however, the court expressly distinguished the yard from common hallways used by other tenants or outsiders to access individual units. *Id.* The court noted that, unlike a common hallway or entrance, the back yard was not accessible to anyone who wished to approach the building's tenants. The court further noted that the yard itself was surrounded by a fence, rendering the yard comparatively more removed and private than a common hallway. *Id.* Taking these factors as a whole, the court concluded that the defendant's privacy had not been so diluted by the fact that he shared the yard with other tenants of the building as to render his expectation of privacy unreasonable. *Id.*

The yard in *Fixel* is readily distinguishable from the common hallway in the present case. As noted earlier, any visitor to either unit, including delivery persons, solicitors and customers of May Franklin's business, would pass through the common hallway to reach either unit. Given the comparative openness of the common hallway, the hallway lacked the same degree of remove and privacy from the building's visitors as the yard in *Fixel*.

legitimate expectation of privacy in the common hallway of the duplex.

B. Probable Cause for Arrest

The Government further contends that, even if we assume, arguendo, that Mr. Villegas was seized in an area in which he had a legitimate expectation of privacy, evidence of Mr. Villegas' identity obtained in the course of his detention following his arrest and as a result of his statements to Agent Rickey does not fall within the Fourth Amendment's exclusionary rule because there was probable cause for his arrest.

The exclusionary rule vindicates an individual's entitlement to shield his person, house, papers and effects, from the Government's scrutiny until a valid warrant has issued. *Hudson v. Michigan,* 547 U.S. ___; 126 S. Ct. 2159, 2165 (2006). However, because the exclusionary rule visits penalties upon the Government, and hence the public at large, on account of an officer's violation of the law, application of the exclusionary rule "must bear some relation to the purposes which the law is to serve." *New York v. Harris,* 495 U.S. 14, 17 (1990) (quoting *United States v. Ceccolini,* 435 U.S. 268, 279 (978)) (internal quotation marks omitted). The rule of *Payton v. New York,* 445 U.S. 573 (1980), which prohibits the warrantless, nonconsensual entry into an individual's home to make an arrest, is "designed to protect the physical integrity of the home." *Harris,* 495 U.S. at 17. Because it is the absence of probable cause, not the absence of a warrant, that renders unlawful the custody of an individual by the

Government, continued detention of a suspect following an arrest inside his home, but supported by probable cause, is not rendered unlawful by the absence of a warrant. *Id.* at 18-19. Therefore, the Supreme Court held in *New York v. Harris,* 495 U.S. 14 (1990), that the exclusionary rule does not apply to statements made by a defendant while in custody outside of the home when the police have probable cause to arrest the suspect, even though the arrest itself may violate Payton. *Id.* at 21.

Probable cause exists when, at the time of arrest, the arresting officer possesses "knowledge from reasonably trustworthy information that is sufficient to warrant a prudent person in believing that a suspect has committed, or is committing a crime." *United States v. Breit,* 429 F.3d 725, 728 (7th Cir. 2005). Whether a police officer acted on probable cause is determined "based on the common-sense interpretations of reasonable police officers as to the totality of the circumstances at the time of arrest." *Id.*

At the time of the arrest, Officer Lutz had probable cause to arrest Mr. Villegas for violation of 8 U.S.C. § 1326(a) and (b). An individual violates § 1326(a) when, after having been deported previously, he is found in the United States without first having obtained the consent of the Attorney General to apply for readmission before reembarking for the United States. 8 U.S.C. § 1326(a). On the day of Mr. Villegas' arrest and prior to the arrest, Officer Lutz had been told by Officer Obergon that there was an immigration apprehension request for Mr. Villegas' arrest because he had reentered the United States

illegally after having been deported previously as an aggravated felon. Officer Obergon also had showed Officer Lutz a picture of Mr. Villegas. Officer Obergon had obtained this information in the course of an investigation into Mr. Villegas' involvement with the Mexican Posse, an inquiry he had conducted as a part of his duties as a member of the MPD's Gang Squad. Officer Obergon also had learned of this apprehension request in the course of his investigation. Absent any reason to believe otherwise, Officer Lutz was entitled to deem reliable the information received from his fellow officer. *United States v. Parra,* 402 F.3d 752, 764 (7th Cir. 2005) (noting that officers effecting an arrest need not know all of the facts that constitute probable cause when they reasonably act at the direction of another officer).

Thus, at the time Officer Lutz saw Mr. Villegas, Officer Lutz had trustworthy information from a reliable source, Officer Obergon, that Mr. Villegas had been deported previously and had not obtained the permission of the Attorney General to reenter the United States. When Officer Lutz saw Mr. Villegas in the hallway, Mr. Villegas was "found in the United States." Therefore, based on the reliable information received from Officer Obergon and Officer Lutz's own observations, Officer Lutz had probable cause to believe that Mr. Villegas had violated 8 U.S.C. § 1326(a).

Thus, there was probable cause to support Mr. Villegas' arrest, which rendered his continued

detention lawful.[6] *Harris,* 495 U.S. at 21. Therefore, any statements made by Mr. Villegas to Agent Rickey at the county jail are not subject to the Fourth Amendment's exclusionary rule. *See id.*; *see also United States v. Roche-Martinez,* 467 F.3d 591, 594 (7th Cir. 2006) (holding that evidence of an alien's identity obtained while the alien was in custody following an arrest pursuant to an unlawful entry did not fall within the exclusionary rule).

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[6] We note further that, in addition to Mr. Villegas' violation of 8 U.S.C. § 1326(a) and (b), at the time Mr. Villegas was arrested and taken from the duplex, Officer Lutz had probable cause to believe Mr. Villegas had violated at least four other Wisconsin state laws. First, Officer Lutz had probable cause to believe that Mr. Villegas had violated state law when he saw the object Mr. Villegas had dropped when Officer Lutz first told him that he was under arrest. *See* Wis. Stat. § 961.41(3g)(e). Officer Lutz testified that when he looked at the clear bag Mr. Villegas had dropped, its contents appeared to be marijuana. Officers are entitled to rely on their experience in determining whether probable cause exists. *See United States v. Breit,* 429 F.3d 725, 728 (7th Cir. 2005). Second, after Mr. Villegas kicked Officer Lutz in the midsection, Officer Lutz had probable cause to believe that Mr. Villegas had committed the offense of battery of a police officer, regardless of whether Officer Lutz had acted with lawful authority when he attempted to arrest Mr. Villegas. *See* Wis. Stat. § 940.20(2); *see also State v. Barrett,* 291 N.W.2d 498, 500-01 (Wis. 1980). Third, when Mr. Villegas spat blood and mucus on Officer Lutz, Officer Lutz had probable cause to believe that Mr. Villegas had committed the offense of throwing or discharging bodily fluid at a public safety worker. *See* Wis. Stat. § 941.375(2). Lastly, assuming that Officer Lutz believed he was acting with lawful authority when he attempted to arrest Mr. Villegas, by struggling with the officers, Mr. Villegas gave Officer Lutz probable cause to suspect that Mr. Villegas had committed the offense of resisting or obstructing an officer. *See* Wis. Stat. § 946.41(2)(a).

Conclusion

Mr. Villegas had no legitimate expectation of privacy in the common hallway of the duplex. Thus, Officer Lutz did not violate Mr. Villegas' Fourth Amendment rights by entering the common hallway and arresting Mr. Villegas without a warrant. Further, Mr. Villegas' arrest and continued detention were supported by probable cause. Consequently, the statements by Mr. Villegas to Agent Rickey while in custody are not subject to the Fourth Amendment's exclusionary rule, regardless of whether Officer Lutz violated Mr. Villegas' Fourth Amendment rights by entering the common hallway and arresting Mr. Villegas without a warrant. The judgment of the district court is affirmed.

AFFIRMED

ROVNER, *Circuit Judge*, concurring in part and concurring in the judgment. I join all but section II(A) of the court's opinion, in which the court sustains Officer Lutz's warrantless entry into the duplex on the ground that Mr. Villegas had no legitimate expectation of privacy in the duplex's common hallway. *Ante* at 10-14. Although the court's analysis on that point is consistent with prior holdings of this circuit and certain of our sister circuits, I respectfully decline to join it for two reasons.

First, it is unnecessary for us to decide whether Mr. Villegas had a cognizable expectation of privacy

in the duplex hallway. As we proceed to hold in section II(B) of today's decision, even if Officer Lutz violated Mr. Villegas's Fourth Amendment rights by entering the hallway without a warrant, that violation would not compel the suppression of the statements that Mr. Villegas subsequently made as to his identity. The probable cause that Officer Lutz had to arrest Mr. Villegas supported his post-arrest detention even if it did not support the officer's warrantless entry into the duplex to make the arrest. Consequently, the statements that Mr. Villegas made while in custody were not subject to the exclusionary rule. *Ante* at 16-18.

Second, I find the line of cases categorically rejecting any Fourth Amendment protection for the hallways and other common areas of multi-unit residential buildings, *see ante* at 11-12, to be conceptually problematic. Essentially, these cases reason that because the resident of a multi-unit building does not have exclusive access to and control over a common hallway, but rather shares that hallway with other building residents and their guests, he can have no reasonable expectation of privacy in the hallway. *United States v. Concepcion,* 942 F.2d 1170, 1172 (7th Cir. 1991); *see also United States v. Miravalles,* 280 F.3d 1328, 1331-32 (11th Cir. 2002) (collecting and summarizing cases). But the relevant question, it seems to me, is not whether the hallway is accessible to other residents and their invitees, but whether the hallway is accessible to the public at large. When the common hallway of a multi-unit building is secured, as Mr. Villegas alleges that his duplex's entry hall typically was, a

resident of that building reasonably may expect that a non-resident – including a police officer – can lawfully enter the building only with the permission of himself or another resident. That expectation is comparable to the expectation of privacy held by people who live together in a single home. We do not say that cohabiting adults have no reasonable expectation of privacy in their shared residence although both have access to some if not all of the premises and either one may admit others; rather, we recognize that each has a cognizable privacy interest for Fourth Amendment purposes and that a police officer normally cannot enter without the consent of at least one resident. *See Georgia v. Randolph,* 547 U.S. 103, 126 S. Ct. 1515 (2006); *United States v. Matlock,* 415 U.S. 164, 94 S. Ct. 988 (1974). I discern no reason why the same principle ought not to hold vis-a-vis the secured common areas of a multi-unit residential building. *See United States v. Dillard,* 438 F.3d 675, 683 (6th Cir.), *cert. denied,* ___ U.S. ___ , 127 S. Ct. 291 (2006) ("Tenants have a reasonable expectation of privacy in locked common areas because a 'tenant expects other tenants and invited guests to enter in the common areas of the building, but he does not expect trespassers.'") (quoting *United States v. Carriger,* 541 F.2d 545, 551 (6th Cir. 1976)); *United States v. Holland,* 755 F.2d 253, 259 (2d Cir. 1985) (Newman, J., dissenting); Sean M. Lewis, Note, *The Fourth Amendment In The Hallway: Do Tenants Have A Constitutionally Protected Privacy Interest In The Locked Common Areas Of Their Apartment Buildings?,* 101 MICH. L. REV. 273 (2002). Otherwise, by declaring that residents have absolutely no

expectation of privacy in such areas, we are necessarily saying that the police are free to enter these areas without the consent of *any* resident of the building and once there walk drug-sniffing dogs up and down hallways, eavesdrop outside of individual unit doorways, and so forth. I believe that such intrusions defy the reasonable expectations of those who live in buildings with secured common areas.

A more plausible (and narrow) ground for saying that the warrantless entry in this case did not intrude upon a cognizable privacy interest might be that the hallway happened to be unlocked when Officer Lutz stepped inside. Although I would hesitate to say that Mr. Villegas and the other residents of the duplex necessarily forfeited any subjective expectation of privacy in the common hallway when they (whether inadvertently or intentionally) left the outer doors open and the inner screen doors unlocked, a police officer confronting an unlocked screen door might think that the common hallway was open to the public and, therefore, open to him as well. *See Dillard,* 438 F.3d at 682 ("By not locking the duplex's doors, Dillard did nothing to indicate to the officers that they were not welcome in the common areas."); *United States v. Mendoza,* 281 F.3d 712, 715 (8th Cir. 2002) ("In the instant case, Mendoza did nothing that would lead the officers to believe he had a protectable interest in the common area of his duplex. He made no efforts to secure the outer door."); *see also Miravalles,* 280 F.3d at 1333.

In any event, because we do not need to reach the issue, I believe it would have been more prudent to leave it for another case in which we do.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 04-CR-272

vs.

RICARDO VILLEGAS,

Defendant.

TRANSCRIPT OF PROCEEDINGS

HEARING: Transcript of Proceedings held before the Honorable J.P. STADTMUELER

DATE: March 7, 2005

PLACE: Room 284, Federal Building, Milwaukee, WI

TIME: 8:30 a.m.

REPORTER: Jennifer M. Dries, RPR

what's the police suppose to do. They started to go into the common area that was open. They didn't have any innovation of spaces. There is an expectation of privacy but it's a much reduced expectation of privacy. The defense has not shown that the police did anything illegal or wrong in this case. Thank you, Your Honor.

THE COURT: Thank you.

Anything further, Ms. Joseph.

MS. JOSEPH: Your Honor, a suppression motion is not an attack on whether or not the police did good work or did not do good work. The focus is whether or not the Fourth Amendment was violated. The 13 house was contained to use the word plus -- use the words, the police vocabulary. That is they had someone or each side of the house so there was an alternative other than entering the residence. Given that the house was contained they could have prevented people from leaving the house while they sought a search warrant. And I think the Fourth Amendment requires a search warrant to enter a residence and that is exactly what 4955 South 14th is. It's a residence, it's not an open area open to the community in general. Thank you.

THE COURT: Thank you, Ms. Joseph.

Well, like any case, there are many different vantage points. One might look at what

occurred at 4955 South 14th Street back on August 20th of 2004 but we can start with a series of facts that I don't believe anyone disputes as evidenced by the exhibits and testimony of Agent Ron Rickey.

First of all, the defendant Ricardo Villegas was the subject of two prior deportation orders that are addressed in Exhibits 7 and 8 that have been received in evidence back in May of 2002. A notification was placed in NCIC recounting that fact and should any law enforcement encounter Mr. Villegas they were asked to notify immigration and hold Mr. Villegas for INS purposes. You might consider it to be a detainer as opposed to a warrant for his arrest.

Matters escalated a bit in the summer of 2004 when Agent Rickey became aware of the fact that Mr. Villegas may indeed be in the Milwaukee metropolitan area and he summoned Mr. Villegas's A file, that is all of the underlying documentation that related to his contacts with the Immigration and Naturalization Service, now referred to as Immigration and Customs Enforcement, so there's no confusion. And had embarked on what would ultimately become a contact with Mr. Villegas as a result of the August 20th arrest by officers of the Milwaukee Police Department.

Mr. Rickey was not present at the time of Mr. Villegas's arrest but rather sought to interview him a couple of days later actually three days later at the Milwaukee County detention facility.

But before addressing what occurred in the context of Agent Rickey's encounter with Mr. Villegas while he was in custody, parenthetically the Court should address the facts attendant to the arrest on August 20th and what occurred at the property at 4955 South 14th Street.

The evidence that the Court draws from or the testimony of Officers Michael Lutz and Ala Awadallah of the Milwaukee Police Department and Maria Ventura, the defendant's sister. A third police officer, Thomas Obergon, O-b-e-r-g-o-n, testified at the suppression hearing held before Magistrate Judge Goodstein back on December 20th of last year. He did not testify in the context of the proceedings today and so although an exhibit was referenced concerning his report of observations at the 4955 South 14th Street property, I do not at the end of the day find anything in either the statement that was referenced in cross-examining Michael Lutz or the testimony offered before Magistrate Judge Goodstein to play any role in my ultimate factual determinations since at the end of

the day it is abundantly clear that Office Obergon was not physically present at 4955 South 14th Street at the time Officer Lutz encountered Mr. Villegas.

The reports suggests otherwise notwithstanding it is clear, in fact uncontroverted from his testimony on December 20th that when he returned to the 4955 South 14th Street property, Mr. Villegas had already been arrested and taken into custody. He may not have been physically removed from the premises, but he had indeed been arrested and there's nothing before me, including Officer Lutz and Awadallah's testimony, to suggest otherwise.

The next matter that the Court is obliged to address is the testimony of Ms. Ventura who suggested in her direct testimony and cross-examination that there was damage done in order to gain entry. When Ms. Moreno-Taxman pressed her as to what she meant, she indicated that the glass in the storm door was found broken. Now it appears to the Court from review of the photographs in the picture that this is one of those types of storm doors where in the summer time the glass goes down into the door and the screen comes up.

Unfortunately the pictures that are before the Court it is almost impossible to tell

whether there's a screen in the door or a glass in the door, but what the Court can discern from the photographs, specifically two of the photographs that were introduced by Ms. Joseph, namely photo 2-V and photo 2-T, that the chain that holds the inner door from swinging all the way open is dislodged from the door. Now when these photographs were taken and when the dislodgment occurred, I have no way of telling. There's a time on the photograph of 1:16:46 but there is no date on any of these photographs and so there's snow on the ground.

Obviously these photos were not taken last summer, but I do find it more than compelling that there is virtually no testimony to corroborate Ms. Ventura's testimony about any glass being broken in the door. It's not reflected in anyone's testimony before Magistrate Judge Goodstein last December and there's nothing that came before the Court today other than Ms. Ventura's testimony to suggest that the glass in the door was broken.

It is a little less than creditable that even in an entry door that if it were a screen door as the officers testified that the storm would be in place during the summer time and it may be, and I appreciate it's nothing more than speculation on the part of the

Court that the glass may have been broken and in the bottom of the door and it was only found broken when somebody tried to bring it up and place it for this past winter season. There's no suggestion that there was glass on the ground by anyone and there's nothing in any police report to suggest that there was glass on the ground back in August of last year.

And so the Court is left with either discounting Ms. Ventura's testimony or simply setting it aside for lack of any corroboration, and at the end of the day what's really counting in the Court's mind with regard to the matter of how these facts should be addressed is the fact that there is nothing to suggest that the door latch was broken or that the doorjamb was broken in order that Officer Lutz gain entry.

His testimony was clear at the suppression hearing and again clear today that he was stationed outside that southeast door on the side of the residence and that the wood door was open. He could see in and when he received word from one of the other officers that -- on the scene that the other suspect, Mr. Munoz was first seeking to exit the premises through a window and then retreated in, that he crossed the threshold of the outside entrance and in doing so immediately observed Mr. Villegas on the

inside actually in the words of Mr. Rickey Mr. Villegas appeared startled and dropped what -- I need to correct something. Officer Lutz indicated that he appeared startled and dropped a corner cut plastic bag that was determined to contain marijuana.

This is an event that occurred before there was any physical encounter between Officer Lutz and Mr. Villegas. He announced that he was under arrest and a scuffle ensued first in the common area of the property at 4955/4957 South 14th Street and the other officers including Officer Awadallah were present and ultimately subdued Mr. Villegas not in the common corridor that served the basement, the first floor residence as well as the second floor residence. And Officer Awadallah testified that rear entrance to the premises on the first floor, specifically through the kitchen was open. Whether Mr. Villegas exited through that door when he was encountered by Officer Lutz, nobody has testified to.

In fact in response to one of my questions, it's clear that Officer Awadallah was not even aware that there was another entrance down the corridor on the first floor off from this common hallway into what is described in Exhibit No. 1 as the living room area of the property at 4955 South 14th

Street.

At the end of the day I believe it truly begs the question to suggest that this common hallway be viewed as part of the private residence of the occupants at 4955/4957 South 14th Street. Clearly Officer Lutz until the scuffle ensued with Mr. Villegas was not physically present in what would be described as the private living quarters or residence at 4955 South 14th Street. He was present in an area that has been repeatedly described as a common hallway and the fact that Michael Lutz did not have to, other than opening a screen door to look in to what he observed through the door, namely to be a common hallway in the eyes of the Court simply does not support a suggestion that this was part of the private living quarters despite the fact that the address was posted on the outside of the structure, despite the fact that a doorbell was posted for each residence on the outside of the structure at the east front entrance.

Because after all, once gaining entry, whether it be a consumer of the crafts sold on the second floor or a delivery person, it cannot truly be suggested that there was any expectation of privacy to either the downstairs or upstairs tenant. Once access was granted through either the front or side door. And

in this particular case, the side door being unlatched and a screen door in the Court's view did not amount to a violation of the defendant's rights under the Fourth Amendment as to the common hallway area.

It is abundantly clear that whoever resided in the basement area where the money and cocaine may have been found certainly on the face of it, although these matters are not before the Court today, more than suggests a Fourth Amendment violation but those matters are not before the Court and there's been no elucidation of all of the facts and circumstances surrounding the discovery and perhaps recovery of money and contraband in the basement area.

And so there being no expectation in the eyes of the law in this common hallway, I find no basis to suppress the evidence in the form of the marijuana that was observed by Officer Lutz at the time that he crossed the threshold after hearing one of his colleagues indicate that an individual was going back into the basement area, although he didn't use those words de facto, we didn't know until today whether it was an upper window or first floor window but the photographs that were admitted today make it clear that it was a basement window.

And while Mr. Villegas was not arrested

in the basement, one might even suggest that the basement itself was not within the gamut of a protected area because there's been no suggestion that the door to the basement was locked or indeed that there was a door precluding someone who had legitimately gained access to the common hallway could not simply walk down the basement stairs into the basement area. But again, those matters are not before the Court today and my opinion with regard to what may have occurred or may have been present there does not reach the basement area.

Finding that there is no basis to suppress the entry and the discovery of the marijuana in the foyer or common hallway area, there then becomes no reason for the Court to supress either the arrest of Mr. Villegas on these local charges, whether they be obstruction, battery to a police officer or a hold or detainer or want, call it what you will by the immigration and customs enforcement.

And similarly I find no basis on the record before me to supress the statement Mr. Villegas gave to Agent Rickey on August the 23rd, three days after his arrest in which basically Mr. Villegas acknowledged that which Mr. Rickey already knew, that is his prior deportations. Mr. Rickey gleaned some

additional information as to when it was that Mr. Villegas returned to the United States and where he had been residing in the intervening years but beyond that, Mr. Rickey really learned very little more other than, as I say, confirming that which he already knew concerning the fact that Mr. Villegas was here illegally.

With respect to where that leaves us, against the elements of the 844 violation, that is the possession of marijuana and the Title 8 violation. With respect to Mr. Villegas's immigration status, the Court finds at the end of the case that once this evidence is viewed in its entirety, the government has met its burden of proof with regard to what was found, what the contraband contained as evidenced in the drug report, which is before the Court as Exhibit 4, together with the violations pertaining to the immigration laws, that is Mr. Villegas having been twice deported was found here in the United States and was present not at the invitation or the grant of authority to be here by the attorney general rather it's quite the contrary, that is he did not receive any authority to return to the United States.

And accordingly, the Court is obliged to enter a judgment of conviction as to both the

immigration violation as well as the Title 21 violation.

I appreciate, Ms. Joseph, that at the end of the day you and your client may feel compelled to challenge the Court's findings and that's certainly Mr. Villegas's right, but I don't' find anything in the Lopez-Mendez case that I brought to counsel's attention this morning to suggest at the end the day it may well be that Mr. Villegas's words to Mr. Rickey may in the view of my colleagues on the Seventh Circuit Court of Appeals coupled with a different finding as to the hallway lead to a different result in terms of the use of the statement.

But the reality is as I read Mendez Lopez, once the individual has been identified, whether through fingerprints or other records, there's no basis to set Mr. Villegas free, only to have him rearrested for these same violations and frankly it defies all logic that in the context of a case such as before the Court today, that there's any basis in the law to suggest that the Fourth Amendment be used as a vehicle to allow someone who through their own admission is here illegally and the record amply demonstrates that should be entitled to the benefit of the observation conclusionary which in my view really ought not apply

on the matter of Mr. Villegas's identification. It's simply does not square.

MS. MORENO-TAXMAN: Judge, I just want to make sure that the Court also -- that the Court is also finding that even without that statement between the fingerprints and the photographs and the evidence of Agent Rickey, there was sufficient evidence to support the conviction on count two regardless of whether that statement was considered.

THE COURT: Well, from the information that was provided by Agent Rickey on the stand this morning on the matter of the photograph, there's certainly more than compelling evidence to suggest that he made the identification both at the jail and here in open court. And the -- on fingerprints though, it's something else because the fingerprints were actually taken subsequent to his arrest and it was that comparison that was made and I'm not sure at the end of the day whether --

MS. MORENO-TAXMAN: Judge --

THE COURT: Whether the Court of Appeals will agree with me that fingerprints taken as a result of what ultimately they may conclude was an inappropriate exercise of law enforcement authority under the circumstances and that's why this is so

difficult.

MS. MORENO-TAXMAN: Judge, the fingerprints were taken before.

THE COURT: Well, what were they compared with? They had to be compared with current fingerprints otherwise they're of no value.

MS. MORENO-TAXMAN: They were compared with --

AGENT RICKEY: With the prior Milwaukee Police Department arrest.

MS. MORENO-TAXMAN: From another time, Judge. All the comparisons of fingerprints were done from nothing related to this date.

THE COURT: All right.

MS. MORENO-TAXMAN: And the photograph, because I was very careful to try to parcel this all out so the fingerprint cards were from a different arrest.

THE COURT: All right.

MS. MORENO-TAXMAN: And prior hearings and the photograph was from California when he was taken out from California one of the deportations.

THE COURT: Well, the photograph was very clear but I was not as clear on the fingerprints. If that be the case, that is the fingerprints from a

prior arrest were compared with the immigration print, then that obviates any concern with respect to whether there was any potential Fourth Amendment violation.

MS. MORENO-TAXMAN: Thank you.

THE COURT: Having made all of those findings, Mr. Villegas, I'm going to order that the probation department complete a presentence investigative report in your case.

I'm also going to direct that the government and the defense file appropriate authority with regard to the matter of the disparities that exist with regard to immigration sentencings across the country, and I'm not sure what the attorney general's position is going to be on this because a number of judges have now raised a significant issue of disparity in sentencings in immigration cases depending on where the defendant is prosecuted and so I have asked in my cases that the probation department present the Court with a presentence report that addresses all of the variables, whether the defendant goes to trial or doesn't go to trial on why certain things are being done and not being done because we are now as judges left with a determination of what is a reasonable sentence as opposed to a strict application of the sentencing guidelines, and it does our society no favor

to have different results in different districts depending on the practice of law enforcement and prosecution and frankly judges when the whole genius of the sentencing guideline approach to sentencing in our federal courts was to eliminate these disparities that had theretofore crept into the sentencing process.

And now it appears, depending on which jurisdiction you're in, that these same disparities, although cloaked under different acronyms, including fast track cases and charge bargaining, etcetera, are resulting in the same sort of disparities that the sentencing guidelines themselves were designed to avoid. And so it is going to be interesting to see how these sentencing matters are going to be addressed, particularly as they relate to immigration offenses given the disparities that the Court is learning of since the supreme court's decisions in Booker and Phan Phan and this is not the first case in which these matters are being addressed. The U.S. attorney's office is aware in another case of mine, although the defendant entered a plea of guilty where the same concerns are before the sentencing commission and before other judges.

Now as to date for sentencing, Ms. Joseph, do you or, Ms. Moreno-Taxman, have any

specific request in that regard.

MS. MORENO-TAXMAN: I do not, Your Honor.

MS JOSEPH: I do not, Your Honor.

THE COURT: All right. I have two dates, either Friday, May 20th at 9 o'clock or Friday, June 3rd at 9 o'clock.

MS. MORENO-TAXMAN: Either one is acceptable, Your Honor, for me.

MS. JOSEPH: Your Honor, May 20th is preferable.

THE COURT: All right.

MS. JOSEPH: If it pleases the Court.

THE COURT: All right. Friday, May 20th at 9 o'clock and I will have my staff contact the probation department and give them that date.

I'm also going to direct that the probation department disclose the presentence report to counsel not later than Monday, April the 25th.

And, Ms. Joseph, if you or Ms. Moreno-Taxman have any objection to anything in the presentence report, those objections must be in the hands of the probation department not later than Friday, May 6th. And if there be any responses to those objections, they must be in the hands of the

probation department not later than Friday, May 13th. And if there be unresolved matters, I will take them up at the sentencing hearing on May 20th, but counsel should be aware that there will be no opportunity to raise new matters, that is matters that were not informally raised with the probation department consistent with the schedule that I've just given you.

Are there any other matters that we need addressed?

MS. JOSEPH: Your Honor, is the disparity issue to be addressed same date the objections are due?

THE COURT: Well, I would suggest that you submit it to the probation department ASAP because I've already told them, you know, in all of my cases that I want the presentence report written and a guideline or sentencing computation made on the basis of what's going on in the boarder states or where there are disparities in sentencing so they are very much aware of at least this judge's request in that regard. But to the extent that you wish to weigh in, the earlier the better.

MS. JOSEPH: Thank you, Judge.

THE COURT: And Mr. Villegas, you should understand that under the law, you have the

right to have Ms. Joseph present during the interview with the probation department and so you need to confer with her as to whether you wish to have her present during any contact with the probation department.

THE WITNESS: Okay.

MS. JOSEPH: Thank you.

THE COURT: The court stands in recess.

(The hearing concluded at 2:15 p.m.)

* * *

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

AUGUST 27, 2007

Before

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. ILANA D. ROVNER, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

No. 05-2678

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* RICARDO VILLEGAS, *Defendant-Appellant.*	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 04 CR 272 J. P. Stadtmueller, *Judge.*

ORDER

Upon consideration of Appellant's petition for rehearing en banc, filed on August 10, 2007, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition.* Accordingly,

IT IS ORDERED that the petition for rehearing en banc is hereby DENIED.

*Judge Flaum took no part in the consideration or decision of the petition for rehearing.

Appendix D

Constitutional Provision Involved

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Appendix E

Statutory Provision Involved

8 U.S.C. § 1326

(a) In general

Subject to subsection (b) of this section, any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless

(A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or

(B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not

required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

* * *

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than years, or both . . . .